CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA
1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5422 · 202/463-5901 FAX

RANDEL K. JOHNSON
VICE PRESIDENT
LABOR, IMMIGRATION & EMPLOYEE BENEFITS

ANGELO I. AMADOR
DIRECTOR
IMMIGRATION POLICY

August 11, 2008

Submitted Via Federal Rulemaking Portal: http://www.regulations.gov

Ms. Laurieann Duarte
General Services Administration
Regulatory Secretariat (VPR)
1800 F Street, NW
Room 4035
Washington, D.C. 20405

Re: Federal Acquisition Regulation ("FAR") Case 2007-013, Employment Eligibility Verification Comments from the U.S. Chamber of Commerce on Proposed Rule to Require Federal Contractors to Participate in the Basic Pilot/E-Verify Program ("Proposed Rule")

Dear Ms. Duarte:

On behalf of the United States Chamber of Commerce ("Chamber"), we submit the following comments in response to the above-referenced Proposed Rule.

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. The Proposed Rule would change existing regulations and procedures as to how federal contractors and subcontractors are expected to verify the work authorization of their workers by mandating an experimental program that Congress expressly made voluntary. Furthermore, the Regulatory Impact Analysis ("RIA") conducted as part of the Proposed Rule does not properly consider the economic ramifications or explore appropriate alternatives.

The Proposed Rule seeks to impose the use of E-Verify, a strictly voluntary program statutorily known as the Basic Pilot Program, on virtually all federal contractors and subcontractors. It would also expand its applicability from new hires only, as is the case in the current voluntary system, to many existing employees of the contractors and subcontractors. E-Verify is set to expire in November of this year[1] and the House of Representatives recently voted

[1] *See* the Basic Pilot Program Extension and Expansion Act of 2003 (PL 108-156).

(407-2) to renew it on a voluntary basis only for an additional five years with two studies to be completed within the next two years by the Government Accountability Office ("GAO").[2]

The first study will examine error rates, the causes for erroneous non-confirmations, and the impact of such erroneous non-confirmations on individuals, employers, and federal agencies.[3] The second study will assess the economic impact of E-Verify on small entities, including small businesses, nonprofit organizations, and government agencies.[4] This latter study will examine the costs of compliance with the program and any steps the Department of Homeland Security ("DHS") has taken to minimize the costs incurred by small businesses participating in E-Verify.[5] It would be beneficial for the federal government to wait for, and then incorporate, the results of these impartial studies into its RIA.

Members from across a wide spectrum of businesses and industries have voiced serious concerns regarding the regulation's economic impact on legitimate businesses, the legal workforce, and government contracting in general. In these comments, the Chamber will identify those concerns, highlight the faulty legal footing on which the Proposed Rule is based, examine the fatally flawed RIA, and address other problematic aspects of what is a legally-insufficient and invalid exercise of regulatory authority. In short, while the Chamber understands that the federal government and employers have a compelling interest in seeing that every tool is made available to employers to ensure a legal workforce, the Proposed Rule is misguided, premature, and unwarranted. The major issues discussed in detail in these comments include:

- The President's unlawful issuance of Executive Order 13465 and Congress explicit creation of E-Verify as a strictly voluntary program;
- The flawed RIA, which fails to account for the true costs of the Proposed Rule to both employers and employees, which would be about $10 billion per year, and the unacceptable administrative burdens to be placed on the federal acquisition workforce;
- The serious flaws in the experimental E-Verify pilot program and the unmanageable changes proposed to it;
- The expansive definition of federal contractor, which violates the expressed purpose in the Proposed Rule; and,
- The consequences of decreased competition in federal contracting, due to the Proposed Rule, and the difficulty in implementation for those contractors who remain.

The Chamber requests that the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council ("Councils") reverse the Proposed Rule, delay any final rule until a proper RIA is conducted, and clarify the substantive issues presented by the Proposed Rule. In the alternative, we respectfully request that the Councils seriously consider our comments to the Proposed Rule and amend the rule consistent with our recommendations.

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[2] *See* the Employee Verification Amendment Act of 2008 (HR 6633), as passed by the US House of Representatives on July 31, 2008.
[3] *Id.*
[4] *Id.*
[5] *Id.*

I. The Proposed Rule is unlawful because it is not authorized under FPASA and the President exceeded his authority when issuing Executive Order 13465.

The requirement of Executive Order 13465, which amends Executive Order 12989, that all federal contractors participate in the E-Verify program for all new hires or those that begin work under government contracts, is not authorized under the Federal Property and Administrative Services Act of 1949 ("FPASA") as a procurement power or under any other statute or the Constitution. Further, it directly conflicts with United States immigration law, and is therefore an unauthorized exercise of regulation by the President. As such, it is not legally authorized.

1. There is No Authority for the President's Issuance of Executive Order 13465.

Presidential power derives either from the Constitution or is delegated by statute or other acts of Congress.[6] However, the President's power to enforce the law is one that must be exercised within the proper bounds – namely, the President, as a member of the Executive branch, cannot prescribe laws.[7] Thus, when an executive order of the President attempts to regulate and make law as opposed to enforce those laws created by Congress, the President has stepped beyond the limits of his executive powers, and the order will not be enforced. Indeed, such was the holding by the U.S. Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*.[8]

In his concurring opinion in *Youngstown,* Justice Jackson described three general ways in which the President may exercise his power to enforce the laws, and the extent of that power in each. First, "when the President acts pursuant to an *express or implied authorization* of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[9] In such a case, the validity of an executive order would be difficult to refute. Second, when acting in the "absence of either a congressional grant or denial of authority, [the President] can only rely upon his own independent powers."[10] This grey area may invite a "test of power" on an executive order issued where there exists only "congressional inertia, indifference or quiescence."[11] Third, and most notably here, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[12] Indeed, Justice Jackson warned that in such an instance "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[13]

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[6] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).
[7] *Id*. at 588 ("President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").
[8] *Id*. at 588-89.
[9] *Id*. at 635 (Jackson, J., concurring).
[10] *Id*. at 637.
[11] *Id*.
[12] *Id*.
[13] *Id*. at 638.

It is the third of Justice Jackson's characterizations of the exercise of Presidential power that applies here, and that concomitantly demonstrates the lack of authority under which Executive Order ("EO") 13465 was issued. Neither FPASA nor any other act of Congress, nor the Constitution, grant the President authority for the Proposed Rule promulgated under EO 13465 and, if issued in final form, it would be invalid. This order at its core seeks to prescribe immigration policy under the veil of a procurement statute; thus it lacks any authoritative basis. Even assuming such authority impliedly exists; however, this order nevertheless conflicts with existing U.S. immigration law, as described in more detail below on Section II, and as such cannot override the rights given under that law.

a. *FPASA*

In issuing EO 13465, the President cites to "subsection 121(a) of title 40 and section 301 of title 3" of the United States Code, along with the authority vested in him by the Constitution, as his authority for amending EO 12989.[14] None of these provide such authority, however, as the order expressly seeks to regulate immigration policy under the veil of a procurement statute.[15]

The applicable provision of FPASA cited by the President in EO 13465 states as follows:

> Sec. 121. Administrative
>
> (a) Policies Prescribed by the President. The President may prescribe policies and directives that the President considers necessary to carry out this subtitle. The policies must be consistent with this subtitle.[16]

Further, the main purpose of FPASA is "to provide for the Government an economical and efficient system" for, *inter alia*, "the procurement and supply of personal property and nonpersonal services."[17] In analyzing the scope of presidential power under FPASA, the D.C. Circuit has held that any executive order issued pursuant to its precepts must bear "a sufficiently close nexus" with "the values of 'economy' and 'efficiency'" outlined in the statute.[18] While FPASA, then, does grant broad authority to the President to establish procurement policies, those policies must bear a close relation to the purposes of the statute itself if they are to be upheld. As shown below, however, Congress's brushstrokes in FPASA were not

[14] Executive Order 13465, 73 FR 33285, June 11, 2008.
[15] *See* 3 U.S.C. § 301, which involves the President's ability to delegate functions which are vested in the Presidential powers – thus, it is not determinative of whether the President actually has the authority to issue this executive order.
[16] *See* 40 U.S.C. § 121(a) (2002).
[17] *See* 40 U.S.C. § 101 (2002).
[18] *AFL-CIO v. Kahn*, 618 F.2d 784, 792 (D.C. Cir. 1979).

so broad as to allow the President to establish policies within the realm of federal procurement which are, in fact, immigration directives.

Notably, the language of EO 13465 reveals the intent to regulate immigration policy under the guise of procurement law. While the Executive Order states at the outset that it "is designed to promote economy and efficiency in Federal Government procurement" by helping promote more stable contractor workforces, ultimately the Executive Order reveals its true aim: "Because of the worksite enforcement policy of the United States *and the underlying obligation of the executive branch to enforce the immigration laws.*"[19] With this purpose stated, then, the Executive Order sets out the requirement for all federal contractors to utilize the E-Verify system. While FPASA permits the President broad authority over procurement, that authority is neither unlimited nor broad enough to sweep within it major changes to immigration policy. EO 13465 clear immigration-based purpose forecloses any inquiry into whether the order bears a sufficient nexus to the goals of the statute.

Nevertheless, EO 13465 immigration-driven focus is not the only reason that the order fails to meet the sufficient nexus test. The scant cost evaluations that have been performed up to this point evidence the dubious nature of the President's assertion that use of the E-Verify system will result in increased "economy and efficiency in Federal procurement" and net cost savings to the government.[20]

The government's own initial estimate provides that the E-Verify requirement would have a cost for employers of replacing authorized employees of $18,980,895 in the first year of implementation alone, and a ten year cost of $101,207,217.[21] These figures alone cast doubt over the President's assertion that implementation of the E-Verify requirement will promote true economy and efficiency in Federal procurement. Furthermore, a peer review of the published Regulatory Impact Analysis, prepared by Richard B. Belzer, Ph.D, under contract to the Labor, Immigration and Employee Benefits Division of the U.S. Chamber of Commerce, clearly illustrates how a proper economic analysis would reveal the total costs of the Proposed Rule to employers to be many times more than shown by the Government. Dr. Belzer's analysis is attached to these comments, and adopted, in full as Appendix A.

In sum, EO 13465 seeks to effectuate immigration policy through a procurement statute and, while the President has authority to promote efficiency and economy in federal procurement, the thinly-veiled effort to tie the immigration-related mandates of the Proposed Rule to this intent is not permissible. No other statutory authority is cited by the President in issuing EO 13465, and none exists, providing authority for the requirement it seeks to impose in the procurement arena. Thus, EO 13465 and the Proposed Rule that attempts to implement it are unenforceable.

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[19] *See* 73 FR 33285 (emphasis added).
[20] *See* 73 FR 33285.
[21] *See* Proposed Rule to Require Federal Contractors to Participate in the Basic Pilot/E-Verify Program, 73 FR 33374, 33377, June 12, 2008.

II. Congress explicitly created E-Verify as a voluntary program. The Proposed Rule requiring mandatory participation in the program by federal contractors is inconsistent with and violates immigration law.

The Chamber supports legislative initiatives to develop and implement an electronic employment verification system that is effective, efficient, and manageable, under real world conditions. Thus, the Chamber has always supported experimental pilot programs where employers participate on a voluntary basis to assist Congress in finding the right balance between deterring illegal immigration, avoiding unnecessary economic disruption, and preventing employment discrimination. Concurrently, the Chamber continues to oppose regulatory mandates set outside the statutory limits created to protect both employers and employees. As explained below, the Proposed Rule crosses the line of legality and disturbs the balance created in the relevant statute.

1. The Proposed Rule conflicts with codified immigration law and, thus, is unenforceable.

The Proposed Rule attempts to mandate E-Verify on federal contractors and subcontractors in response to EO 13465. E-Verify is the progeny of Basic Pilot, one of three original pilot programs authorized by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). The Administration began referring to it as "E-Verify" in 2007. The other two pilot programs have since been discontinued. Authorization for E-Verify was extended until November 2008 by the Basic Pilot Program Extension and Expansion Act of 2003.[22] The authorizing language for the Basic Pilot Program specifically states:

> (a) Voluntary election. Subject to subsection (c)(3)(B), any person or other entity that conducts any hiring (or recruitment or referral) in a State in which a pilot program is operating may elect to participate in that pilot program. *Except as specifically provided in subsection (e), the Secretary of Homeland Security may not require any person or other entity to participate in a pilot program*."[23]

Subsection "e" required agencies of the federal government, the legislative branch, and certain violators to enroll in the system.[24] Thus, it did not apply to government contractors, for whom, as with all other entities not covered by subsection "e," enrollment in the program was made voluntary. The Basic Pilot/E-Verify program was not intended to, and did not, displace the carefully calibrated system of document-based verification Congress created in

[22] *See* Pub. L. 108-156, 117 Stat. 1994 (2003).
[23] *See* 8 U.S.C. § 1324a Note; Pub. L. 104-208 § 402, 110 Stat. 309 (1996), as amended by Pub. L. 107-128 § 2, 115 Stat. 2407 (2002); Pub. L. 108-156, §§ 2 and 3, 117 Stat. 1944 (2003) (emphasis added).
[24] *Id*.

1986[25] and no employer may be forced to forego the verification options guaranteed by statute in favor of E-Verify.

As Justice Jackson noted in *Youngstown*, the President's power is "at its lowest ebb" when he takes measures "incompatible with the expressed or implied will of Congress," and thus such measures must be "scrutinized with caution."[26] In *Chamber of Commerce v. Reich*, the D.C. Circuit held that the President may not use his general procurement powers to override a right established under a pre-existing law.[27] Any scrutiny of EO 13465, however, reveals it to be an attempt to do just this, to effectively transform the IIRIRA's voluntary E-Verify program into a mandatory one for nearly all government contractors.

EO 13465 imposes upon government contractors a blanket requirement that they enroll in the same E-Verify program created under the IIRIRA in order to be eligible to contract with federal agencies. While there are minor exceptions to this requirement for certain types of contracts, in effect EO 13465 creates a mandate for contractors to enroll. Such a requirement, however, flies in the face of the IIRIRA's language holding that "the Secretary of Homeland Security may not require any person or other entity to participate" in the E-Verify program.[28] Thus, EO 13465 not only expressly claims to be grounded in "the underlying obligation of the executive branch to enforce the immigration laws," it also attempts to do so under the guise of procurement policy in the form of regulation that is in conflict with existing immigration law.

It is of no consequence whether the issuance of EO 13465 "transgresses or causes a contractor to violate a *prohibition* of another statute [or] deprives a contractor of a right expressly or impliedly granted by another statute."[29] The mere fact that the IIRIRA does not expressly prohibit government contractors from enrolling in the E-Verify program does mean

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[25] This system was carefully calibrated to address and balance competing policy goals. Congress intended the underlying law to deter illegal immigration, while being "the least disruptive to the American businessman and … also minimiz[ing] the possibility of employment discrimination." H.R. Rep. No. 99-682(I) at 56, 1986 U.S.C.C.A.N. at 5660; S. Rep. No. 99-132 at 8-9.

[26] *See* 343 U.S. at 637-38.

[27] *See* 74 F.3d 1322 (D.C. Cir. 1996). In *Reich*, the court overturned Executive Order 12954, which required all large government contractors to agree not to hire permanent replacements for lawfully striking employees, because it directly conflicted with the National Labor Relations Act, which grants the right to employers to hire permanent replacements for striking workers. 74 F.3d 1322, 1338. Nor is the reliance on *Reich* in any way obviated by the previous Court of Appeals decision in *AFL-CIO v. Kahn*, 618 F. 2d 784 (D.C. Cir. 1979). In *Kahn*, The DC Circuit upheld President Carter's Executive Order setting up a voluntary Wage and Price controls program. The DC Circuit noted that the Carter Executive Order did not conflict with any statutory requirement and was designed to increase the efficiency and savings to the government in its procurement activities. In contrast, as noted in this comment, EO 13465 directly conflicts with the Congressional mandate to make the E-verify program a voluntary program with additional requirements to study its current operational issues. Indeed, as the *Kahn* court stated: "As is clear from the terms and history of the statute (FPASA) and from experience with its implementation, our decision today does not write a blank check for the President to fill in at his will. The procurement power must be exercised consistently with the structure and purposes of the statute that delegates that power." *Id*. at 790. Indeed, we believe that *Kahn* read in conjunction with *Reich* makes it clear that the President overstepped his authority and the Councils have compounded that erroneous assertion of authority with the ill-conceived proposed regulatory structure at issue.

[28] *See* 8 U.S.C. § 1324a Note; Pub. L. 104-208 § 402, 110 Stat. 309 (1996), as amended by Pub. L. 107-128 § 2, 115 Stat. 2407 (2002); Pub. L. 108-156, §§ 2 and 3, 117 Stat. 1944 (2003) (emphasis added).

[29] *Reich*, 74 F.3d at 1330.

that the order can withstand review. EO 13465 deprives contractors of their right *not* to enroll in the voluntary E-Verify program. And yet, at the same time, EO 13465 does indeed transgress a prohibition of the IIRIRA, namely that the government "may not require any person or other entity to participate" in the E-Verify program.[30] Thus, whether by infringement on a right or direct transgression of statute, EO 13465 is an impermissible exercise of Presidential authority.[31]

2. Businesses are currently using this pilot program as intended by Congress and the current Proposed Rule violates the expressed legislative intent.

The voluntary nature of E-Verify is critical to the carefully balanced system Congress created and employers have designed their verification systems in full reliance on Congress's statutes. To the extent large companies enroll in E-Verify, the American Council on International Personnel ("ACIP") found that most large companies do so only in certain states or at particular hiring locations, consistent with the voluntary nature mandated by statute.[32] The Proposed Rule, requiring essentially all federal contractors to utilize E-Verify for all new hires and some current employees in all of their facilities, is unquestionably an "end run" around the carefully-crafted, voluntary scheme developed by Congress. In recent testimony before a House subcommittee on electronic employment verification systems, Congressman Ken Calvert, who wrote the bill that created E-Verify, reiterated why the program was created as a voluntary, pilot program, "I intentionally created it on a limited basis for the very reasons we are here today: to ensure that it would not be abused or be a source of misinformation. It is vital that participating employers who volunteer to use the program, and the new employees who are hired, are not disenfranchised."[33]

Representative Michael McNulty, Chairman of the Social Security Subcommittee of the Ways and Means Committee, also recently reflected on why Congress today hesitates to authorize an expansion of E-Verify into a mandatory program, "It would be very difficult to get a majority to vote for a nationalization of the E-Verify system at this point in time…this whole

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[30] *See* 8 U.S.C. § 1324a Note; Pub. L. 104-208 § 402, 110 Stat. 309 (1996), as amended by Pub. L. 107-128 § 2, 115 Stat. 2407 (2002); Pub. L. 108-156, §§ 2 and 3, 117 Stat. 1944 (2003) (emphasis added).

[31] Nor can FPASA's general implied powers delegated to the President be interpreted to override the IIRIRA's provision here. *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1333 (D.C. Cir. 1996) (the canon of statutory construction is that "repeals by implication are not favored") (citations omitted). Indeed, typically it is the more recent statute, not the older, that overrides, which is the opposite of the situation that would be encountered here. *Id*. (overriding a former statute is done only "if such a construction is 'absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all") (citations omitted). Finally, "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." *Id*. (citations omitted). The IIRIRA's provision specifically addresses the E-Verify program; FPASA does not, and thus FPASA's generalized purposes cannot trump the specific language of the IIRIRA on this issue. *See Reich*, 74 F.3d 1322.

[32] Comment submitted by the American Council on International Personnel to the Department of Homeland Security's Interim Final Rule published at 73 Fed. Reg. 18944 on OPT Extension, June 9, 2008, p. 4.

[33] Testimony of Congressman Ken Calvert, Committee on the Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, "Hearing on Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Prevent Misuse." (June 10, 2008) While Congressman Calvert's testimony ultimately supported an expansion of E-Verify, his testimony highlights Congress's intent to ensure that E-Verify is tested on a limited basis to avoid negative impacts on employers and employees.

issue needs a lot more careful thought."[34] Clearly, Congress is still not prepared to make the E-Verify program mandatory. The Proposed Rule unreasonably violates the federal statute and ignores Congressional intent. Moreover, the implementation of this Proposed Rule is beyond the scope of the Councils authority, as Congress is the only authority that may make changes to the IIRIRA statutory mandate.

There is little doubt that DHS has as its own objective to "require" as many employers as possible to participate in the program, which might be shared by the Councils. DHS has supported states across the country, like Arizona and Colorado, which have imposed an E-Verify obligation on employers despite serious questions of pre-emption under federal law. DHS has also opposed state initiatives, such as the law passed in Illinois that sought to prohibit the pre-mature use of E-Verify.[35] DHS has even imposed an E-Verify requirement through regulatory fiat in a context which it readily admits has no relationship to the E-Verify program, as a condition for extending Optional Practical Training for foreign Science, Technology, Engineering, and Math ("STEM") students.[36]

But whether or not DHS or the Councils approve of Congress's statutes and the careful balancing and compromises underlying the legislative scheme is beside the point. *Congress* has created a detailed system of employment verification and has, by statute, approved a variety of verification options from which every employer in the country may choose, and *Congress* created the Basic Pilot Program as an experimental and strictly voluntary addition to this menu of choices. The President and federal agencies must act within the limits of this legislation; to the extent the Proposed Rule would require employers to use a voluntary system, to the exclusion of other options approved by Congress, the rule is unlawful.

The Councils may attempt to argue that the rule does not make E-Verify mandatory and, thus, does not violate IIRIRA, since employers are voluntarily contracting with the federal government and are free to choose not to. Such an argument is disingenuous. Given the vast scope of contractual relationships between the federal government and private contractors, encompassing at the government's own estimate more than 168,000 federal contractors and 3.8 million employees, the reality is that this Proposed Rule will force employers to comply or, at least in some instances, go out of business. With federal contractors conducting hundreds of billions of dollars of business with the government, the Proposed Rule makes E-

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[34] Chairman McNulty's comments after May 6, 2008 House Committee on Ways and Means Committee Hearing on E-Verify and Impact on SSA. *See also* Chairman McNulty's opening remarks at the hearing "Imposing a substantial new immigration-related workload on SSA would potentially swamp the agency and threaten its ability to serve our constituents…For this reason, proposal for mandatory verification that do not realistically address the workload placed on SSA's shoulders should not be enacted."

[35] *United States v. Illinois,* C.D. Ill., No. 07-3261, *complaint filed* 9/24/07.

[36] *See* 73 Fed. Reg. 18944 for rule creating new provision 8 CFR 214.2(f)(1)(ii)(C). This new rule makes recipients of bachelor's, master's, and doctoral degrees in certain STEM (science, technology, engineering, mathematics) fields eligible for a one-time 17-month extension of post-completion Optional Practical Training. To be eligible for the extension, the student's employer must be registered in E-Verify. The irony is that a company that is looking to obtain an OPT extension for the STEM student who is currently in its employ, would be required to register in the E-Verify system. However, the very student that has triggered this E-Verify mandate for the company would not be subject to E-Verification as she is already an employee of the company and only new hires are subject to E-Verify.

Verify for federal contractors a *de facto* coercive and mandatory program, in clear violation of the statute.[37]

As stated, E-Verify is sun-setting in November of 2008. Congress chose to carefully monitor this program, sensitive to its vast impact on the entire United States workforce, preserving for itself the right and the obligation to determine its continuing applicability and whether, and when, it may become mandatory for part or all of the United States employer community.

III. This Proposed Rule is a 'significant regulatory action' and has a significant economic impact on a substantial number of small entities. The Regulatory Impact Analysis is fatally flawed as is the Initial Regulatory Flexibility Analysis.

The cost estimates summarized in this proposed regulation are grossly understated. Accepting the baseline assumption that approximately 168,324 contractors and subcontractors and 3.8 million employees will be impacted, it is questionable that the cost of the Proposed Rule over a 10 year period as estimated, would be only $550.3 million and that the average direct cost to a contractor with 10 employees in the initial year would be $419; for a contractor with 50 employees $1,168; for a contractor with 100 employees $2,102; and for a contractor with 500 employees $8,964.

Dr. Belzer's analysis of the RIA illustrates the flawed economic assumptions and major conceptual errors on the cost side. First, the RIA extrapolates to a coerced population of federal contractors from the current E-Verify population, which consists of volunteers. Second, it ignores the opportunity costs to authorized workers of forced unemployment resulting from their inability to resolve SSA and/or DHS record mis-matches. Third, it ignores the opportunity cost to employers associated with the forced unemployment of workers—including replacement and re-training—revealed by E-Verify as possibly, but not necessarily, unauthorized. The government can only legitimately exclude the opportunity costs associated with the recruitment and training of workers ***who are known*** by the employer to have been unauthorized. Fourth, the RIA excludes the significant cost of the required re-negotiation of some existing contracts. Finally, the RIA does not factor in the significant cost of a reduced supply of firms willing to be government contractors or who will now contract at a higher cost to the government, factoring in the additional burden of participating in the E-Verify program.

In addition, the benefits assessment is also flawed. The RIA merely provides a short discussion of benefits that consists of a mix of rulemaking justifications. Justifications for rulemaking that lack economic content cannot be translated into benefits, a term that has a specific technical interpretation in economics.[38] The RIA never really explains or quantifies these benefits. For example, the RIA argues that increased security will be a new benefit of the Proposed Rule. In fact, many employers contracting with the government already undertake

[37] *See Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).
[38] *See* Appendix A of these comments for a full discussion on this issue.

expensive security clearance procedures for its employees working on these contracts, which make the E-Verify program totally superfluous.

Furthermore, the government makes suspect assumptions as to what the number of contractors would be and the number of employees affected, which are probably incorrect, particularly if, as it seems to be, it ignores the costs involved in re-negotiating ongoing contracts. Dr. Belzer illustrates how, even when taking the RIA at face value, the potential annual opportunity costs associated with force unemployment of authorized workers would amount to an aggregate first-year opportunity cost of about $10 billion. The RIA is also flawed because it does not provide a thorough and complete analysis of reasonable alternatives, only briefly and inadequately discussing the alternative of limiting the Proposed Rule's applicability to future employees.

IV. The Proposed Rule places unacceptable and extraordinary administrative burdens on an overworked federal acquisition workforce.

The pressures and demands on federal acquisition personnel have reached a breaking point and it cannot reasonably be expected to implement and administer a proposed rule of this magnitude. As drafted, hundreds of thousand of hours of critical contracting workforce time would be required to modify existing contracts and to enforce and administer the rule.

The Proposed Rule at Table 1 makes no attempt to account for the extraordinary use of contracting workforce resources to implement and enforce this rule.[39] The Proposed Rule assumes only $1,547,194 in costs for the federal government in 2009 for costs the federal government will incur as "operating costs from each query that an employer executes" and from "resolving tentative nonconfirmations." The Proposed Rule has clearly not considered costs associated with contracting officer time and effort.

First, the Proposed Rule requires contracting officers to modify existing indefinite quantity/indefinite delivery ("ID/IQ") contracts to add the new E-Verify contract clause.[40] For each ID/IQ contract, the Proposed Rule states:

> Under the final rule, Departments and agencies should, in accordance with FAR 1.108(d)(3), amend existing indefinite-delivery/indefinite quantity contracts to include the clause for future orders if the remaining period of performance extends at least six months after the effective date of the final rule and the amount of work or number of orders expected under the remaining performance period is substantial.[41]

FAR 1.108(d)(3) allows the contracting officer to make modifications to an existing contract to add new FAR contract clauses only for "appropriate consideration." Thus, each modification of each ID/IQ contract to add the E-Verify contract clause will require the

[39] *See* 73 FR at 33377.
[40] *See* 73 FR at 33375.
[41] *Id.*

contracting officer to negotiate "appropriate consideration" for the modification, a process that could easily take 4-5 hours of contracting officer time for each contract with each contractor where the negotiation is non-controversial. However, in many instances, contractors will demand and be entitled to compensation for the costs of implementation and compliance with the new E-Verify contract clause. The contracting officer's time for negotiation of a modification involving significant compensation for these costs could take in excess of 20 hours per modification per contract.

Considering, the thousands of active ID/IQ contracts at the various federal agencies, the Councils have significantly underestimated the effect and expense of requiring the modification of pre-existing contracts to require compliance with the new E-Verify contract clause. The General Services Administration alone has well over 5,000 active ID/IQ contracts that will extend for at least six months after the effective date of a final rule. The burden on contracting officers to simply modify pre-existing contracts will be an extraordinary expenditure of precious federal resources that could be better spent focusing on higher priority contract issues.

Second, as part of contract administration, contracting officers with very little guidance from the Proposed Rule will be forced to determine (1) if contractors are complying with the E-Verify contract clause; (2) how a non-compliant contractor should be treated; (3) whether contract performance must be delayed or contract payment withheld for non-confirmation or non-compliance; and (4) how much contractors can charge to their contracts as allowable costs for implementing and administering the Proposed Rule's E-Verify requirements within their companies. This burden and complexity of these administrative duties cannot be underestimated. Moreover, contracting officers are left with no guidance regarding whether a failure to comply with the E-Verify contract clause will be grounds for termination for default, suspension, debarment, or negative past performance evaluations.

Third, the Proposed Rule adds a new memorandum of understanding ("MOU") between DHS, SSA, and the contractor as "a performance requirement under the terms of the Federal contract or subcontract."[42] Not only will contracting officers be burdened by a requirement to know and enforce the terms of an agreement that is not within the four corners of the contract, the inclusion of an MOU in addition to, or as a supplement to, the contract performance requirements, is contrary to contract formation law. The MOU creates a separate enforceable, and potentially conflicting, obligation between the parties that is beyond the scope of the contract. The MOU will create confusion and each time the MOU is altered, contractors will be

[42] Employers currently participating in E-Verify execute an MOU with DHS and SSA. However, "[DHS] is in the process of revising its MOU, program manual, training materials, Website, and other E-Verify system materials to reflect the duties that federal contractors will take on." *See* 73 FR at 33377. A new DHS/SSA draft MOU was filed as part of the "supporting and related materials" to the Proposed Rule. *See* FAR Docket No. FAR-2008-0001-0005.1, June 13, 2008. The draft MOU filed as part of the Proposed Rule amends Section C. "RESPONSIBILITIES OF THE EMPLOYER," in the current MOU by adding Paragraphs 16 and 17, necessitated by the Proposed Rule's E-Verify mandate on existing employees assigned to work under a government contract. The contractor would be obligated to initiate E-Verify for each employee who is an assigned employee within 30 days of the award of the contract, or within 3 days after the employee has become an assigned employee, whichever date is later. The additional paragraphs would outline how and when the employee's previously executed I-9 form could be used as a basis for this newly mandated E-Verify mandate.

entitled to submit contract claims for the costs of implementing changes to the MOU. Moreover, a separate MOU is unnecessary if E-Verify will simply become another contract process or performance requirement subject to normal contract remedies. The clause itself, the False Claims Act, or some form of self-certification should be sufficient to meet the E-Verify compliance requirements.

In formulating the final rule, the Councils must consider, and attempt to limit, the costs and burden of this rule on the contracting workforce. The burden must be considered in terms of both expense and added stress to an already overburdened contracting workforce. Federal agencies must also recognize that Congress has already struck an intricate balance amongst effective employment verification, avoiding burdens on employers, and preventing discrimination—a balance the Proposed Rule cannot upset. If improving the federal acquisition workforce is a priority, it cannot be done by imposing extraordinary immigration enforcement initiatives on the contracting workforce.

V. E-Verify, still in its pilot/experimental stage, exhibits serious flaws. Expansion of E-Verify in this way unfairly and dangerously burdens the Social Security Administration, federal contractor employers, U.S. citizens, and lawfully work-authorized immigrants.

Congress carefully designed the E-Verify program as a pilot program so that it could closely monitor the program's effectiveness to ensure that the federal government established the correct balance between government's enforcement obligations, employers' responsibilities to avoid discrimination, and employee rights. Currently, 69,000 employers use E-Verify on a voluntary basis. Within this limited and controlled test setting, studies have demonstrated that E-Verify is rife with errors and inaccuracies. As a result, the Proposed Rule would overburden agencies such as the SSA with unmanageable extra work loads; employers would suffer the consequences of potential interruptions in work flow; and legitimate work-authorized employees would lose their livelihoods.

In early June 2008, the House of Representatives conducted hearings on the E-Verify system within the context of dealing with the upcoming "sunset" of the program, and assessed if and when the program should become mandatory.[43] It became clear from the testimony and Department of Homeland Security announcements that while the system has been improved, the program has a long way to go.

In the Government Accountability Office ("GAO") Report issued during the June hearings, the GAO evaluated the accuracy of E-Verify, and indicated that 7 percent of the E-Verify queries cannot be immediately confirmed as work authorized by the Social Security

[43] June 10, 2008. U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International law. Hearing regarding: Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Prevent Misuse.

Administration, and about 1 percent cannot be immediately confirmed by DHS.[44] Similarly, according to a 2007 Westat independent study commissioned by DHS, 0.1% of native-born citizens and 10% of naturalized citizens have erroneous data in their DHS and/or SSA files that would cause them to be tentatively nonconfirmed. According to SSA's own estimates, 17.8 million records in the SSA database, the primary source of data for the E-Verify program, contains discrepancies related to name, date of birth, or citizenship status.[45] Considering the high database error rates and the inordinate number of inaccuracies with regard to U.S. citizens and other work eligible nonimmigrants, the Westat report commissioned by DHS concluded that "the database used for verification is still not sufficiently up to date to meet the [IIRIRA] requirements for accurate verification."[46] The GAO report goes on to elaborate that DHS and SSA current resources are not equipped to manage a significant expansion of E-Verify users, particularly a nationwide electronic employment verification mandate.[47]

The Proposed Rule's economic analysis as previously noted, seriously underestimates the effect and substantial costs to employers. The Proposed Rule's preamble unfairly underestimates the consequences of a mandatory E-Verify program to federal contractor employers. There are significant costs that the employer must bear, way beyond the need on occasion for the "purchase of a computer," lost productive time spent with the DHS "on-line tutorial," and time spent on data entry and resolving nonconfirmations. In a recent U.S. Chamber of Commerce statement to the House Subcommittee on Social Security of the Committee on Ways and Means, Mitchell C. Laird, Esq, President of MCL Enterprises, provided practical, first hand experience on what types of burdens a company will confront after a mandatory E-Verify rule goes into effect,

> At the time that the Arizona statue was passed, MCL Enterprises, like most Arizona companies, was not using E-Verify. Preparing for the transition to using E-Verify was extremely costly and disruptive to our operations. All of our restaurant managers, assistant managers, and directors of operations had to attend external training. The training cost the company both in fees that are paid to attend the training sessions and in lost productivity of these critical employees. In addition to the external training, administrative staff of the company had to take time from their normal duties to review the E-Verify procedures manuals, take the online training, develop a written policy, and then communicate that policy to the employees at the stores. We hire new employees every day. This means that we must create redundancies in the system and have multiple persons trained at every task in the Form I-9 and E-Verify process in order to

[44] United States Government Accountability Office (GAO) Testimony Before the Subcommittee on Social Security, Committee on Ways and Means, House of Representatives, "Employment Verification – Challenges Exist in Implementing a Mandatory Electronic Employment Verification System." (May 6, 2008).
[45] *See* Office of the Inspector General, Social Security Administration, "Accuracy of the Social Security Administration's Numident File," Congressional Response Report, A-08-06-26100, December 2006.
[46] Westat, *Findings of the Web Basic Pilot Evaluation* (Washington, D.C.: September 2007).
[47] *Id.* Note 7, p. 10.

> comply with the requirement that all E-Verify queries be run within three days of the date of hire.[48]

Mr. Laird went on to educate the committee on the fact that the training costs are ongoing, given the turnover in managerial and administrative positions and despite all the training there will be errors in the I-9 forms which must be resolved in order to process the E-Verify submissions. This is much more time consuming than DHS seems to realize. Mr. Laird also went on to describe what happens in those instances where the system's response is not "employment authorized":

> When the initial response from E-Verify is something other than "employment authorized," there are going to be additional costs to the employer. When there has been either an SSA or a Department of Homeland Security (DHS) tentative confirmation, a notice must be prepared and delivered to the employee. The information on the notice is re-verified with the employee. If there is an error, then a new query must be run. If there is no error and the employee contests the tentative nonconfirmation, then a referral letter must be generated and delivered to the employee. Federal law requires that the employer continue to treat the employee as fully authorized to work during the time that the tentative nonconfirmation is contested. This means the employer cannot suspend the employee or even limit the hours or the training for the employee.
>
> Someone must monitor any unresolved E-Verify queries on a daily basis to make sure that employee responses are being made in a timely manner.[49]

Small companies that do not have the means to set up systems and staffing with adequate training to monitor 'nonconfirmations' may find themselves at risk for noncompliance.

In addition, we cannot discount as a problem the potential for discrimination, inadvertent or otherwise, and the potential liability for claims, fair on unfair. "Since work-authorized foreign-born employees are more likely than U.S.-born employees to receive tentative nonconfirmation erroneously," Westat reported, "the result is increased discrimination against foreign-born employees." The GAO also confirms that approximately 30 percent of employers use the verification process in ways that are prohibited — to screen potential employees or restrict work assignments while employees contest nonconfirmation letters.

Concerns with E-Verify by its current users go beyond small businesses. One multi-billion dollar company, which voluntarily chose to participate in the program, explains the

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[48] Testimony of Mitchell C. Laird, President, MCL Enterprises, Inc., on behalf of the U.S. Chamber of Commerce, to House Subcommittee on Social Security of the Committee on Ways and Means on "Employment Eligibility Verification Systems (EEVS) and the Potential Impacts on Social Security Administration's (SSA's) Ability to Serve Retirees, People with Disabilities, and Workers," May 6, 2008.
[49] *Id*.

significant costs they are experiencing in implementing the Basic Pilot program: "[Our] company is moving to a web-based I-9 application that incorporates E-Verify through a designated payroll agent. Project implementation is extensive and costly to set up a robust process that will accommodate HR personnel changes, required training and other changes. The company has a team of about 8 professionals so far working on the project, including IT resources and a dedicated Project Manager."[50]

ACIP finds this scenario widespread for large companies with several business units.[51] As with small business owners in Arizona, the tentative nonconfirmation procedures are found to be extremely troublesome by large businesses as well. The same multi-billion dollar company reported that "in their experience, corrections at the Social Security Administration ("SSA") usually take in excess of 90 days. Employees must wait four or more hours per trip, with repeated trips to SSA frequently required to get their records corrected."[52]

In sum, at this point in time, it is premature for Congress or any federal agency to significantly expand the utilization of E-Verify on a large scale without substantial time for preparation or 'phase in' when the program is seriously flawed in terms of database accuracy and insufficient federal resources. Mandating the E-Verify program for close to 200,000 federal contractors and their millions of employees is an imprudent and dangerous decision leaving employers ill-equipped to manage the new costs, administrative burdens, and potential loss in workforce.

VI. By mandating that federal contractors verify or re-verify existing employees each time they are assigned to work on a new contract, the Proposed Rule too radically restructures the E-Verify program, making it unmanageable and unworkable for employers.

Under the Proposed Rule, federal contractors are required to verify the work eligibility of two distinct sets of employees: (1) New Hires: All individuals hired by the federal contractor during the life of the contract term, regardless of whether s/he works on the contract; and, (2) Existing employees: All employees assigned by the contractor to perform work within the U.S. on the federal contract. This new mandate is entirely inconsistent with current E-Verify program rules which specifically prohibit employers from using E-Verify for existing employees. It is also inconsistent with Congress's intent in creating the current system—Congress *explicitly rejected* a system of continuing verification as unnecessarily burdensome and inconsistent with Congress's multiple goals.[53] As discussed earlier, in order to accommodate this broad expansion of E-Verify's current coverage and Congressional intent, DHS and SSA must amend the E-Verify Memorandum of Understanding ("MOU").

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[50] Comment submitted by the American Council on International Personnel to the Department of Homeland Security's Interim Final Rule published at 73 Fed. Reg. 18944 on OPT Extension, June 9, 2008, p. 4.
[51] *Id*.
[52] *Id*.
[53] *See* H.R. Rep. 99-682(I), at 57.

The amended MOU adds several significant and specific obligations for employers.[54] It would obligate employers to essentially re-process I-9s (re-verification) for current employees because, in many instances, there would not be enough information in their I-9 files to go through the E-Verify process. Employees who have successfully completed their I-9s but did not present photo identification documents when originally processed, and individuals whose employment authorization documents presented at the time of original I-9 processing have since expired, would be called back by their employers to complete the I-9 process, again, something absolutely unprecedented.

Even for those employees who have facially valid I-9s, the MOU suggests that the employer must go through the process of reviewing "the form I-9 with the employee to insure that the employee's stated basis for work authorization has not changed (including, but not limited to, a lawful permanent resident alien having become a naturalized U.S. citizen)."[55] The Proposed Rule seems to suggest that for each employee who works on a federal contract the employer must engage in another conversation with the employee, even though the employee has already satisfied the I-9 document requirements. This completely eviscerates all the protections put in place to assure that employers do not discriminate against new hires or current employees. A fundamental principle of the I-9 program is that an employer without good cause cannot inquire beyond the documents that the employee presents to complete the I-9 form as long as they are in compliance and are among those documents listed as valid.

The proposed MOU is not just an end run around the regulatory process, but fundamentally violates the basic principles of the authorizing statute, the Immigration Reform and Control Act ("IRCA"). IRCA establishes a procedure that must be followed before changing any federal verification requirement. It requires the President to monitor the effectiveness of the verification system, and to transmit to the House and Senate Judiciary Committees detailed written reports of proposed changes well in advance of the effective date of any change.[56] Furthermore, any change in the types of documents required to prove work authorization status is a "major change" that requires written notice to Congress at least two years before implementation.[57]

In addition, the re-verification of current employees required by the Proposed Rule is too substantial an expansion of the E-Verify program's scope, and poses a series of complex problems to employers and employees alike. It will provide justification for indiscriminately screening current employees through E-Verify who are ostensibly identified by the employer to work on a government contract, whether they eventually work on the contract or not.

The law abiding employer who does not know at the onset of a federal contract who will eventually work on the contract may be over-inclusive when it runs E-Verify for each new contract, sweeping in those who might perform work on the contact. This new requirement,

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[54] The new amended DHS/SSA draft MOU was filed as part of the "supporting and related materials" to the Proposed Rule. *See* FAR Docket No. FAR-2008-0001-0005.1, June 13, 2008.
[55] *Id.* in paragraph 16 of the proposed MOU.
[56] *See* 8 U.S.C. § 1324a(d).
[57] *See* 8 U.S.C. § 1324a(d)(3)(A)(iii), (D)(i).

whereby existing employees who will work on the contact must participate, is too radical a change to E-Verify's fundamental tenets, which take pains to ensure employers do not use E-Verify to screen current employees to avoid discrimination claims. It will be particularly difficult for employers to manage assignment changes. In addition, while some employees may be easily connected with the work of a contract, other employees of the federal contractor, such as its HR support, legal, and accounting teams, will not be so readily identifiable. Finally, it will be difficult for contractors to keep track of employees as they move on and off a contract.

VII. The expansive definition of federal contractor in the Proposed Rule violates expressed purpose in the proposal.

The Proposed Rule creates coverage obligations which contradict the announced purposes of the proposed regulation. The Proposed Rule purports to be consistent with the FPASA which is designed to provide "the Federal government with an economical and efficient procurement system."[58] Notwithstanding the stated intent, the Proposed Rule establishes a scope of coverage far in excess of the policy purpose expressed in the proposal and far beyond the standards set in a variety of labor requirements attached to procurement. To put this into context, the proposed regulation covers any contract or subcontract that exceeds the micropurchase threshold of $3,000. While there are minor exclusions for "commercially available off-the-shelf" ("COTS") items and for subcontracts for the supply of materials, the Proposed Rule in effect creates a Universal Coverage regime without reference to the impact on small employers or the enormously disproportionate assertion of the procurement authority.

To put this into context, the federal minimum wage is $6.55 per hour. A contract or subcontract of $3,000 would not pay more than three months compensation for one employee at the minimum wage before triggering the requirements of the Proposed Rule. If, however, the subcontract ran for an entire year, this contractor would be required to include every new employee hired after the contract was awarded, and the single employee working on the subcontract, in the E-verify system. There is no proportionate coverage.

In addition, the vast scope of coverage runs contrary to the scope of almost every other labor standard attached to the procurement system. For instance, EO 13201, issued by President Bush on April 18, 2001, requires government contractors and subcontractors to post a "Beck" notice regarding certain rights of employees, if they work in a facility covered by a collective bargaining agreement. The requirements under EO 13201 are rather benign—a poster must appear in each workplace notifying the employees of their rights—as compared to the requirements which will be imposed by the Proposed Rule.

Yet, the requirements for coverage under EO 13201 and the implementing regulations of the Secretary of Labor[59] are substantially lower. The applicable clause does not have to be included in contracts for purchase below the Simplified Acquisition Threshold of $100,000 and

[58] *See* 40 U.S.C. 101, 121; 73 FR 33375.
[59] *See* 29 CFR Part 470.

the contractor must have more than 15 employees. The latter threshold was put into the regulations in order to make this requirement consistent with other federal labor laws.[60]

Other labor regulations related to procurement laws have similarly proportionate coverage. EO 11246, as amended, and its implementing regulations are the latest of a series of executive orders dating back to 1940 requiring government contractors to adhere to the equal employment obligations required of all employers in the United States. They also require employers to take appropriate affirmative action consistent with the law to insure that the pool of employees available to work on government contracts is diverse as generally reflective of the available workforce. These are policy goals at least as pertinent as the requirement that employers employ eligible workers. Yet these programs, and related statutory programs directing the employment of qualified disabled workers and veterans, have threshold levels far in excess of those required by the Proposed Rule. General coverage is for contracts at $10,000 and the substantive requirement is for contracts of at least $50,000 and fifty employees. Furthermore, the requirement to list contractor jobs for veterans has been recently raised to contracts of no less than $100,000.[61]

While it is not the intent of the Chamber to prioritize among the various procurement related labor obligations, it is, however, important to emphasize the vastly disproportionate obligations attempted to be imposed by the Proposed Rule without any underlying authority other than FPASA. As a matter of both policy and law, the proposed regulation has no supporting basis.

VIII. Unless the exemptions from the Proposed Rule are expanded to include all "commercial item" contracts, many current contractors and subcontractors will exit the federal marketplace and competition will substantially decrease.

The potential reduction in competition for federal contracts resulting from this Proposed Rule cannot be underestimated. In 1994, the Federal Acquisition Streamlining Act ("FASA") enacted a strong preference for the purchase of commercial items.[62] As the Federal Acquisition Regulations explain, the intent of the preference was to establish "acquisition policies more closely resembling those of the commercial marketplace."[63] In the years since 1994 and the promulgation of more commercial-like terms and conditions for the purchase of commercial items by federal agencies, the federal government has attracted thousands of commercial companies as active federal contractors. This has saved the government untold billions and has allowed the government access to technologies that otherwise would be unavailable.

These commercial businesses sell products and services to the federal government in much the same manner as these products are sold to the private sector. For most of these companies, sales to the federal government represent much less than 5% of the total company sales. These companies only sell to the federal government as long as the terms and conditions

[60] *See* 29 CFR § 470.3; 69 FR 16379, March 29, 2004.
[61] *See* 73 FR 18712-15, April 7, 2008.
[62] *See* Pub. L. 103-355.
[63] *See* 48 C.F.R. § 12.000.

of sale are as similar as possible to a sale to a private sector entity. Should the Proposed Rule be promulgated, it will likely upset this delicate balance. Many commercial companies will simply chose to exit the federal marketplace rather than incur the expense of compliance or risk the ramifications of non-compliance.

Contrary to the intent of FASA and the FAR, the Proposed Rule only exempts an extraordinarily small subset of commercial items, defined as "commercially available off-the-shelf ("COTS") items, or COTS items with "minor modifications," from the application of the wide-reaching E-Verify requirements. As defined at 22.1801 of the Proposed Rule COTS include only an item of supply that is a:

(i) commercial item (as defined in paragraph (1) of the definition at FAR 2.101);
(ii) Sold in substantial quantities in the commercial marketplace; and,
(iii) Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace

This definition creates an exception for an extraordinarily small subset of commercial items. Indeed, the definition of COTS is so narrow as to be contrary to the broader mandate for the federal government to have commercial item acquisition policies closely aligned with the private sector. The RIA should take into account the impact from a cost perspective that this will have on the federal government. The government will have less timely access to some commercial sector technologies, which was the case prior to the enactment of FASA and other statutes that have allowed the government to buy commercial products and services more easily, and fall behind the curve on technologies.

The definition of COTS will also create significant confusion for commercial item contracting. For contractors that will only provide goods not subject to the Proposed Rule, contracting officers will have to create special COTS-only contract vehicles. Otherwise, the government will lose an entire sector of contractors that provide COTS and non-COTS products, but with the new Proposed Rule's E-Verify requirements will chose to only execute new COTS-only contracts. As evidenced by even the drafting of the Proposed Rule, the application of a new type of commercial item contracting will be difficult, complex and often confusing.

Furthermore, the narrow COTS definition fails to include commercial services, even where the commercial services may be ancillary to the supply of a commercial product. Thus, the government will quickly confront situations where a company will have employees working on contracts for COTS items where the employees are exempt from E-Verify requirements, but if that item needs repair, the company will either refuse to repair the item or the employees performing those commercial services will have to go through the E-Verify process. Under this situation, some contractor employees would be exempt and other contractor employees not exempt under the same contract (possibly the same employees) if the contract is for COTS items and follow-on repair services, as is the practice at many agencies. This inconsistent application will cause some companies to refuse to execute contracts for the repair of COTS items they have sold and will create confusion among the contract parties as to their E-Verify obligations. It will

also lead to the multiplication of contracting vehicles by contracting officers in order to sustain sufficient competition, and avoid confusion and delays in contract performance.

IX. Flowing down the E-Verify requirement to all tiers of subcontractors is extraordinarily burdensome and the enforcement of such a requirement is unclear.

The Proposed Rule includes an extraordinary mandate to flowdown the E-Verify requirements to all tiers of service and construction subcontracts exceeding $3,000 and performed in the United States. This mandate alone will significantly decrease the number of commercial companies that provide services at the subcontract level. Subcontractors enjoy the benefit of not being in privity of contract with the government and thus avoid many of the significant contract requirements and responsibilities incumbent upon a prime federal contractor.

Because of the additional burdens to be a prime federal contractor, many companies have business models that focus solely on being a subcontractor in order to avoid the morass of all the contracting regulations and requirements. Many current subcontractors will simply refuse to provide services if the cost of providing services include signing up to E-Verify.

In addition, the Proposed Rule does not clarify a prime federal contractor's responsibility to ensure compliance with E-Verify by all tiers of subcontractors. Since the federal government will not be in privity of contract with the subcontractors and these companies are often not identified to the government, it is unclear how enforcement would flow down from prime federal contractors. At a minimum, the Proposed Rule should explicitly state that prime federal contractors are not liable for their subcontractors' negligence in utilizing the E-Verify system.

X. Use of the vague terms "assigned employees" and "exceptional cases" will make implementation difficult and inconsistent among contractors.

The Proposed Rule requires the use of E-Verify to verify the employment eligibility of all "assigned employees" and only allows the waiver of the E-Verify requirements in "exceptional cases." Both terms are extraordinarily vague and will be difficult for contractors and the government to apply. The vagueness will lead to inconsistent usage of the "exceptional case" waiver and vastly different verification of employees who a contractor determines are "assigned" to the contract. While the term "assigned employees" is defined to mean "an employee who was hired after November 6, 1986, who is directly performing work, in the United States, under a contract," direct performance on a contract is difficult to consistently define.

Many contractors have employees that work on both government contracts and commercial contracts at the same time. The Proposed Rule is not clear that these employees would be "assigned employees." Some contractors use employees for bid and proposal functions, and indirect corporate functions such as legal, accounting, and information technology. Some contractors might consider these employees direct employees, while others will not. Without further clarification, employees that manage multiple government and

commercial contracts will be treated differently by different contractors—needlessly increasing companies' liability.

In addition, many companies have been through multiple consolidations since 1986, making the "hired after November 6, 1986" date difficult to implement. The Proposed Rule does not clarify whether employees acquired as the result of an acquisition or merger after 1986, but hired by their original corporation before 1986, would need to be verified.

Finally, to avoid arbitrary, inconsistent and unfairly narrow determinations of what constitutes an "exceptional case" waiver, the Councils should provide further guidance on the common elements of an "exceptional case," and non-exclusive examples of such exceptions in the regulations. In the absence of some articulated standards to guide the acquisition community in the regulations, every agency will establish their own differing standard for "exceptional."

XI. Recommendations

We appreciate the Councils' concern as we too grapple with finding the best way to balance the many legitimate interests that would be impacted by the Proposed Rule. However, the above analysis demonstrates that the Proposed Rule should be withdrawn based on its illegality and its many practical implementation problems. Should the Councils insist on moving forward, despite these many issues, we believe that the following changes should at a minimum be made:

- Withdrawal of the Regulation**:** To reiterate again, we first recommend that the Councils withdraw the proposed regulation and allow Congress to make appropriate decisions with regard to the continued implementation and possible expansion of E-Verify. As demonstrated above, the President and the Councils lack the proper authority to obligate federal contractors to use the E-Verify program, which by statutory mandate is strictly voluntary. Congress, through its "hearing" process, is particularly well suited to review and assess the E-Verify pilot program and its effect on the relevant agencies and employers and to determine how and when the program should be expanded or changed, if at all.

  Congress can and would be able to take into account the funding implications of expansion of the program, which is particularly significant given the defective Regulatory Impact Analysis. It is premature to mandate that close to 200,000 federal contractors and 4,000,000 employees participate in the program without these issues being thoroughly and completely addressed by Congress.

- Defer Rulemaking to at least One Year: In the alternative of withdrawing the Proposed Rule, we strongly urge the Councils to defer issuing a final rule for a period of one year in order to provide an opportunity for Congress, DHS, and SSA to fully consider the benefits and consequences of a mandatory program. In particular, it is critical that DHS and SSA be able to certify capability to manage a sudden surge in usage, and to allow for a nationwide program to educate and train contractors. The possibility that Congress will

not reauthorize E-Verify and may, at best, provide only a temporary extension makes this a preferable course.

- Enrollment into E-Verify – Incentives and Staggered Effective Dates: We suggest that since federal contracts will have to be negotiated or re-negotiated taking into account the additional costs of participating in the E-Verify system in accordance with the terms of the Proposed Rule that specific monetary incentives be formulated, identified, and published by the Councils. These incentives should realistically take into account the additional expense to employers, and will have the effect of encouraging companies to participate in the E-Verify system on a voluntary basis.

  We would also suggest that to manage the inevitable increased usage of the program and to allow for employers to prepare sufficient resources for the program, the effective dates for participation in this special E-Verify initiative should be staggered over a period of 5 years. The earlier effective dates should be for the largest noncommercial contracts and gradual rollout in descending order of size, measured by the number of employees that would be required to effectuate the contract.

- Recommended Modifications to Proposed Provisions: If the Proposed Rule is to be implemented, the scope should be carefully defined and narrowed to make transition into the E-Verify program, manageable, on the part of employers, employees, DHS, and SSA.

- We recommend the following changes to the Proposed Rule.

  A. Registration Period Extended: Currently the Proposed Rule requires a contractor or subcontractor to enroll in the E-Verify program within 30 days of the contract award. To allow for orderly transitions and provide time for employers, the initial registration period for employer after a contract is awarded should be extended from 30 days to at least 90 days. The 30 day time period is unrealistic, particularly during the initial implementation transition period.

  B. Commercial Item Exemption: The Proposed Rule should be modified to exclude all commercial items, not just COTS items and COTS items with minor modifications. This is consistent with two decades of successful procurement reforms of providing the government access to commercial products and services.

  C. Subcontractor flowdown: The Proposed Rule requires the flowdown of the E-Verify requirements to all tiers of service subcontractors and does not define whether prime contractors will be legally liable with ensuring subcontractor compliance. The flowdown requirements should be removed or, at a minimum, limited to major subcontracts exceeding $5 million. If included, the flowdown should state that the prime federal contractor is not responsible for enforcement or compliance by the subcontractor.

D. Threshold Standard: The applicability standard should be proportionate to its requirements. The basis may be the coverage threshold under EO 13201, which does not require the applicable clause unless purchases total $100,000 or more and the contractor has more than 15 employees.

E. Worksite Specific and Entity Specific Applicability: To ensure consistency with E-Verify's current scheme, any final rule should allow federal contractors to limit participation in E-Verify to specific work sites and the specific corporate entities that are engaged in the contract work. The current system's flexibility in allowing employers to shape and limit their participation has been a key factor in facilitating greater use of E-Verify as employers can gradually expand use as they become more adept and expert at managing the program. The same principle would be applicable to contractors.

F. Eliminate 'current' employees: We strongly recommend that the Councils strike the requirement that existing employees be processed through E-Verify. This requirement changes the standard E-Verify rule that prohibits the re-verification of employees, conflicts with Congress's intent in creating a nationwide system of employment verification, and poses significant practical and ethical issues for employers. There is no policy reason why federal contractors should be so radically different from all other employers who participate in the program. This would also compel companies to venture into unknown territory by requiring employers to re-verify employees and inquire into their status with all the inherent resulting legal difficulties which that entails. Applying E-Verify in its existing form to contractors is dramatic enough of an expansion of the program.

G. MOU Changes: There are a number of aspects to the proposed MOU, only necessitated if the program is made applicable to 'current' employees, which as previously indicated are extremely troubling. They go to the very core question as to the appropriateness of an employer investigating, once again, an employee who has successfully completed the I-9 process and, therefore, properly works for this employer in full compliance with the Immigration Reform and Control Act. An Employee should have the option of being able to opt out of consideration for work on this contract to avoid impermissible intrusions on his or her privacy, but obviously, to do so, would and could create a stigma and perhaps put his or her employment at risk. Even merely forewarning the employee will create a dilemma if the employee objects to being considered for the contract without admitting to any violation of U.S. immigration laws. Accordingly, at the very least, the MOU should be designed to minimize, to the extent possible, further intrusion as to the employee and to avoid discrimination.

- Only solicit and provide data needed for actual E-Verify with no solicitation of additional documents such as photo identification.
- Employees should not be required to confirm if there has been any change in his or her status, unless and until a "tentative non-confirmation" is

received and, if it is received, the employee should have the opportunity to opt out of consideration for the project without penalty. Potential costs to the employer, given the restrictions on how she can use her workforce, should be negotiated into the contract with the federal agency.

- A provision to indemnify the employer with full disclosure to the employee should be required as a term of the contract between the federal agency and the employer.

H. Define "assigned employee": The Proposed Rule requires the use of E-Verify to verify the employment eligibility of all "assigned employees," which is defined to mean "an employee who was hired after November 6, 1986, who is directly performing work, in the United States, under a contract." To avoid inconsistent and unfair application of this term, the definition needs to be narrowly limited to employees who perform work that is "necessary" to the contract. Exemptions should be explicitly provided under any final rule to employees who work on contracts as only incidentally as part of the course of their duties. Examples of assigned employees and exemptions should be provided so that federal contractors can understand which employees are affected.

I. Enforcement: Left unaddressed is precisely what the enforcement consequences would be to an employer once registering with the E-Verify program. Substantial compliance with the any final rule's provisions should afford federal contractors with significant and meaningful advantages with regard to worksite enforcement penalties and consequences. A final rule should adopt a "safe harbor" of protection to employers who make good faith efforts to comply with the new regulation. Specific exemptions for technical or minor errors in I-9 and E-Verify compliance should be included in the regulatory scheme. As an example, I-9 "paper" violations and minor errors such as late E-Verification of new employees should, under appropriate circumstances, not create liability for the employer or subcontractor.

More important, there should be a presumption that the employer is not in violation of the terms of its federal contract unless the employer who has in fact registered and is participating in E-Verify has in fact substantially and significantly violated the terms of the program.

J. Waiver Requirement: This is a key provision in the Proposed Rule, but only gets passing and minimal attention in the Proposed Rule's language and preamble. Since the Proposed Rule's scope is thousands and thousands of contracts, it is important that contractors understand what types of "exceptional circumstances" would warrant waiving the mandatory E-Verify requirement. Without a fuller explanation of the waiver requirement, the Councils pay only lip service to this essential carve-out provision. For example, one-time events, such as contracting a conference hall for a government event, should be excluded as an "exceptional circumstances" beyond the reach of any final rule.

XII. Conclusion

The Proposed Rule should be withdrawn for the many reasons discussed in these comments. We look forward to working with the Civilian Agency Acquisition Council, the Defense Acquisition Regulations Council, and the Department of Homeland Security to craft suitable, legal alternatives.

Sincerely,

Randel K. Johnson
Vice President
Labor, Immigration and Employee Benefits

Angelo I. Amador
Director
Immigration Policy

Of Counsel:
Angela B. Styles
Kris D. Meade
CROWELL & MORING LLP
www.crowell.com

David B. Grunblatt
Lawrence Z. Lorber
PROSKAUER ROSE LLP
www.proskauer.com